MAJLIS PERBANDARAN PULAU PINANG

v.

LEMBAGA RAYUAN NEGERI PULAU PINANG & ANOR

HIGH COURT MALAYA, PENANG
RK NATHAN J
[ORIGINATING MOTION NO: 25-116-97]
14 AUGUST 2002

ADMINISTRATIVE LAW: *Exercise of administrative powers - Local authority - Application by developer for planning permission for development - Local authority directed that existing building be preserved - Appeal against directive of local authority - Whether directive an appealable matter - Whether local authority had power to issue such directive - Town and Country Planning Act 1976, ss. 21(3)(a)-(g), 22(5)(i), 23*

STATUTORY INTERPRETATION: *Construction of statutes - Purposive approach - Ejusdem generis principle - Whether s. 21(3) had to be read ejusdem generis to the specific matters enumerated in s. 21(3)(a)-(f) of the Town and Country Planning Act 1976 - Town and Country Planning Act 1976, s. 21(3)*

The second respondent, a developer, had applied for planning permission for development, namely the demolition of an existing building, and for the erection of a new building thereon. The applicant, the local authority, pursuant to the powers conferred upon it by s. 21(3)(g) of the Town and Country Planning Act 1976 ('TCPA'), directed the second respondent to amend its application in accordance with the comments and recommendations of the relevant departments before the application could be further processed for a final decision by the applicant. After expiry of the stipulated period of three months, the second respondent returned to the applicant its amended plans; the applicant directed that the existing building should be preserved (direction no. 16) and that the second respondent's proposed development be erected in the vicinity of the said building.

The second respondent, however, filed a notice of appeal against the applicant's directive under s. 23 of the TCPA which the first respondent, an appeal board, heard. The applicant raised a preliminary objection that the said directive was not an appealable matter under s. 23 of the TCPA; the first respondent however allowed the appeal and held that the applicant had no powers to issue the said directive as s. 21(3) of the TCPA had to be read *ejusdem generis* to the specific matters enumerated in s. 21(3)(a)-(f) of the TCPA which meant that the

directions given to the second respondent must relate only to the external appearance of the proposed building and not to the retention or preservation of an existing building. Dissatisfied, the applicant sought judicial review by way of this writ of *certiorari* to quash the first respondent's decision.

Held:

[1] The appeal board was not wrong when it said that the specific matters enumerated in s. 21(3)(a)-(f) of the TCPA possessed a common and dominant feature in that they all relate to the external character of a proposed building. The appeal board was dealing with "the intention of the legislature as gathered from the entire section" and general words were to be read as a continuation of the preceding specific matters in s. 21(3)(a)-(f) of the TCPA. Taken in that context, it was obvious that the genus identified by the Appeal Board related to the "erection of a building" and the "written directions" relate to that building and not the retention or preservation of an existing building. For the purposes of issuing or giving written directions pursuant to s. 21(3) of the TCPA, matters like historical and architectural significance as well as preservation of buildings could not be the subject matter of "written directions". Compatibility with architecture, character or appearance of buildings located in the surrounding area of a new building could only be the subject matter of conditions imposed under s. 22(5)(i) of the TCPA. Therefore, direction no. 16 was *ultra vires* the TCPA. (pp 193 a-c & 194 b-c)

[Application dismissed.]

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 ***(refd)***

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 ***(refd)***

Kesultanan Pahang v. Sathask Realty Sdn Bhd [1998] 2 CLJ 559 ***(foll)***

Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 ***(refd)***

Kumpulan Kamunting Sdn Bhd v. Rajoo & Ors [1983] 2 MLJ 400 ***(refd)***

Lucy v. WT Henleys Telegraph Works Co Ltd [1969] 3 All ER 456 ***(refd)***

Magor & St Mellons Rural District Council v. Newport Corporation [1950] 2 All ER 1226 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 ***(refd)***

Maunsell v. Olins & Anor [1975] 1 All ER 16 ***(refd)***

Muhammed Hassan v. PP [1998] 2 CLJ 170 ***(refd)***

Northam v. London Borough of Barnet [1978] 1 All ER 1243 ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 ***(foll)***

Rethina Development Sdn Bhd v. Majlis Perbandaran Seberang Perai Butterworth [1990] 1 CLJ 558; [1990] 3 CLJ (Rep) 24 ***(dist)***
Seaford Court Estates Ltd v. Asher [1949] 2 All ER 155 ***(refd)***
Syarikat Bekerjasama-sama Sungai Gelugor v. Majlis Perbandaran Pulau Pinang [1996] 3 CLJ 335 ***(refd)***
Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441 ***(refd)***

Legislation referred to:
Town and Country Planning Act 1976, ss. 2, 21(1), (3)(a), (b), (c), (d), (e), (f), (g), 22(1), (2), (3), (5)(g), (i), 23(1), 24(3), (5), 36

For the applicant - Gurubachan (L Andrew); M/s Andrew & Co
For the 1st respondent - Mazni Buang DPP
For the 2nd respondent - Balasundaram; M/s Balasundaram

Reported by Suresh Nathan

JUDGMENT

RK Nathan J:

Facts

The applicant is a local authority incorporated pursuant to the Local Government Act 1976 and is the local authority for the island of Penang. The applicant is also the local planning authority for the Island of Penang pursuant to the Town and Country Planning Act 1976 (TCPA) and the local authority pursuant to the Street, Drainage and Building Act 1974. The 1st respondent is constituted under s. 36 of the TCPA to hear appeals pursuant to s. 23 of the TCPA against decisions of the Local Planning Authority made under s. 22(3) of the TCPA. The 2nd respondent is a developer.

On 30 December 1993 the 2nd respondent made an application for planning permission for development, namely the demolition of the existing building known as No. 457 Jalan Burma, Penang (the said building) on Lot No. 2334 Section 1, George Town, North East District, Penang (the said land) and for the erection of a 20 storey terrace apartments thereon. The registered owner of the said land is The Visitor in the Federation of Malaya of the Christian Brothers' Schools. The said land is zoned 'Educational' in the applicant's Interim Zoning Plan No. 1/1973. By a letter dated 26 April 1994 the applicant directed the 2nd respondent to amend the documents/plans submitted together

with its application, in accordance with the comments and recommendations of the relevant departments before its application could be further processed for a final decision by the applicant. This was done by virtue of the powers conferred upon the applicant by s. 21(3)(g) of the TCPA. The 2nd respondent was required to comply within three months failing which the application was deemed to have been withdrawn.

By a letter dated 21 March 1995 and after the expiry of the stipulated period of three months, the 2nd respondent's architect returned to the applicant the amended layout plans for its further consideration and approval together with a fresh proposal for the demolition of the said house and for the erection of a 24 storey building consisting of a basement, 60 unit apartment office, restaurant and car park.

The 2nd respondent's application was then referred to the planning and building committee of the applicant which then referred the matter to the development and planning standing committee of the applicant for recommendation on conserving the said house and for re-zoning of the said land from 'educational' to 'commercial'. On 14 October 1996 the development and planning committee of the applicant made the following decision.

> (i) Permohonan perlingkungan semula dari 'pelajaran' kepada 'perdagangan' adalah diperakukan tetapi Bangunan No. 457 Jalan Burma hendaklah dikekalkan. Pemaju boleh membina di tepi bangunan sediada. Walaubagaimanaun, sekiranya pemaju ingin merobohkan bangunan sediada, mereka perlu menunggu siapnya kajian bangunan-bangunan warisan di Pulau Pinang oleh Jawatankuasa Pemiliharaan di peringkat Negeri.

By a letter dated 18 November 1996 the applicant informed the 2nd respondent of the said decision and reproduced the said directive and directed the 2nd respondent to amend the plan accordingly in order to comply with the said decision of the applicant and to re-submit the plan within two months from the date of the said letter for its consideration. However the 2nd respondent filed a notice of appeal dated 17 December 1996 against the directive of the applicant contained in the letter dated 18 November 1996, under s. 23 of the TCPA. The said appeal was heard on 27 September 1997 by the 1st respondent.

The applicant raised a preliminary objection at the hearing to the effect that the said direction given by the applicant to the 2nd respondent that the said building be preserved and that the 2nd respondent's proposed development be erected in the vicinity of the said building, was not an appealable matter under s. 23 of the TCPA.

After hearing submissions on the preliminary issue the appeal board ruled as follows:

> It is the unanimous decision that the preliminary objection has not been established. Any aggrieved party, aggrieved by whatever decision must be allowed to appeal. The statutory right of appeal cannot be rendered useless. It cannot be constructed to defeat the law. The only provision in the Act is Section 23. To accept Mr Murgan's view is to deny the Appellant a right of appeal.

After hearing the appeal on the merits the 1st respondent allowed the 2nd respondent's appeal and held that the applicant had no powers to issue the said directive.

Dissatisfied with the decision of the 1st respondent the applicant sought judicial review by way of this writ of *certiorari* (encl. 12) to quash the decision of the 1st respondent.

Findings Of This Court

Mr Gurbachan for the applicant took the same preliminary objection before me as his first issue. It is common ground that the directive given by the 1st respondent was given pursuant to s. 21(3)(g) of the TCPA. It is therefore necessary to reproduce the entire s. 21(3) of the TCPA which reads as follows:

> s. 21(3) Where the development involves the erection of a building, the local planning authority may give written directions to the applicant in respect of any of the following matters, that is to say:
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> (a) the level of the site of the building;
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> (b) the line of frontage with neighbouring buildings;
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> (c) the elevations of the building;
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> (d) the class, design, and appearance of the building;
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> (e) the setting back of the building to a building line;
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> (f) access to the land on which the building is to be erected; and
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> (g) any other matter that the local planning authority considers necessary for purposes of planning.

The question is, is the directive given by the 1st respondent pursuant to s. 21(3)(g) of the TCPA appealable. Before considering this question it is necessary to reproduce the relevant section that deals with the manner in which an application of such a nature is dealt with by the applicant.

The relevant provisions of s. 22 of the TCPA are reproduced:

(1) As soon as possible after the receipt of an application for planning permission, or, if the application is one to which s. 21(6) applies, as soon as possible after the expiry of the period within which objections may be made or, if objections have been made, as soon as possible after the objections have been dealt with under s. 21(7), the local planning authority shall decide on the application for planning permission.

(2) In dealing with an application for planning permission, the local planning authority shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular:

(a) the provisions of the development plan, if any,

(b) the provisions that it thinks are likely to be made in any development plan under preparation or to be prepared, or the proposals relating to those provision;

(ba) the provisions of the Sewerage Services Act, 1993;

(bb) the development proposal report; and

(c) the objections, if any, made under section 21.

(3) After taking into consideration the matters specified in subsection (2), the local planning authority may, subject to sub-s. (4), grant planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant planning permission.

(4) The local planning authority shall not grant planning permission if:

(a) the development in respect of which the permission is applied for would contravene any provision of the development plan; or

(b) the applicant for planning permission has neither paid the development charge payable in respect of the development nor obtained the permission of the local planning authority under s. 34(1) to pay the development charge by instalments.

(5) ...

(5A) ...

(6) If planning permission is granted, whether with or without conditions, it shall be conveyed to the applicant in the prescribed form and at the same time a notice of the grant thereof shall be given to any person who has made any objection pursuant to section 21(6).

Section 23(1) which relates to appeals against the decision of local planning authorities reads as follows:

> (1) An appeal against the decision of the local planning authority made under section 22(3) may be made to the Appeal Board within one month from the date of the communication of such decision to him, by:
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> (a) an applicant for planning permission aggrieved by the decision of the local planning authority to refuse planning permission or by any condition imposed by the local planning authority in granting planning permission; and
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> (b) a person who has lodged an objection pursuant to section 21(6) and is aggrieved by the decision of the local planning authority in relation to his objection.

Since there is no dispute by the parties that the directive given by the applicant by its letter dated 18 November 1996 was in fact made pursuant to s. 21(3)(g) of the TCPA, it is the case of the applicant that there is no provision for appeals against directions made pursuant to s. 21(3). To my mind, the procedure for appeal as set out in s. 23 will surface when a decision is made pursuant to s. 22(1). Here the decision making stage had yet to be reached. What is the position if there is a dispute at the initial stages namely when the application for planning permission had been submitted and a party objects to written directions. The thrust of the applicant's argument on the 1st respondent's right to hear the appeal is predicated upon the argument that there was no "decision" by the applicant in respect of the application for planning approval made by the 2nd respondent. The applicant contends that its directions to the 2nd respondent's architect in particular direction No. 16 with regard to preserving the building, was not a decision appealable to the 1st respondent. In support of this the applicant argued that an appealable decision must be conveyed to the aggrieved party in the prescribed forms provided under the Planning Control (General) Rules 1990 made under the TCPA. Thus the applicant's case is that the decision that was made the subject of the appeal before the 1st respondent, was not a decision granting planning permission either absolutely or subject to conditions or a refusal to grant planning permission. The applicant argued that only a decision made under s. 22(3) of the TCPA can be made the subject of an appeal under s. 23 of the TCPA.

I take the view that the decision referred to in s. 23 of the TCPA must of necessity be taken to include any direction or ruling made by the applicant in relation to any matter that concerns the application for planning permission made pursuant to s. 21(1) of the TCPA. I hold that the words 'written directions'

in s. 21(3) must by reason of legislative framework considerations be taken also to mean a decision of the local planning authority as provided under s. 23(1). A written direction is also a decision.

The applicant relied on *Syarikat Bekerjasama-sama Sungai Gelugor v. Majlis Perbandaran Pulau Pinang* [1996] 3 CLJ 335 for the proposition that a condition not made under s. 22(3) read with s. 24(5) of the TCPA was not an appealable matter under s. 23. With respect this is not the proposition that emerges from that case. Mahadev Shankar JCA was discussing the second issue that formed the subject matter of the appeal in the context of the availability of an alternative remedy by way of an appeal as opposed to an application for judicial review. It is in that context that the learned judge said the words that are now claimed by the applicant as suggesting that there is no decision within the context of s. 23 of the TCPA. Even when this case went up to the Federal Court Edgar Joseph Jr in a lengthy and erudite judgment dealt with the issue at hand namely whether the society's letter dated 10 August 1993 fell within the meaning of an appeal under s. 23 and read with s. 24(3) of the TCPA. The Federal Court went further to hold that the decision of the council dated 20 September 1993 refusing review made pursuant to the letter dated 10 August 1993 was not an appealable decision under s. 23 and read with 24(3) of the TCPA. Section 21(3)(g) of the TCPA was not an issue (see *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungei Gelugor dengan Tanggungan* [1999] 3 CLJ 65) . It must be remembered that a case is only authority for what it actually decides (see *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133). I hasten to add that it is not my intention to breach the principle of *stare decisis*. In the circumstances I hold that the question whether a written direction given under s. 21(3) of the TCPA is appealable or not, is open for this court to decide, as I have not been shown any binding authority or precedent. In my view the *Syarikat Bekerjasama-sama* case is certainly not an authority for what the applicant suggests.

Purposive Or Literal Construction (Cases Omissus)

It is the applicant's case that it was wrong for the 1st respondent to have adopted the 'purposive construction' in preference to the 'literal construction' in overruling the preliminary objection raised by the applicant at the hearing before the Appeal Board. The applicant relied on *Kumpulan Kamunting Sdn Bhd v. Rajoo & Ors* [1983] 2 MLJ 400, and various other authorities to argue that where the meaning of the statutory words are plain or precise and are unambiguous, the purposive approach cannot be adopted.

It is my judgment that the problem in this case is one of *casus omissus* rather than one of being precise and unambiguous. It is regrettable that the TCPA has not provided for a situation where an applicant for planning permission is aggrieved by the imposition of a condition by way of written directions given pursuant to s. 21(3) of the TCPA.

The TCPA is both a consolidating as well as a comprehensive act in respect of planning law in this country. The fact that s. 36 provides for the establishment of an Appeal Board is sufficient to suggest that aggrieved parties involved in the process of planning should be given the right of an appeal. If, as suggested by the applicant, the literal approach is to be adopted then quite clearly it could result in an oppressive and capricious situation where a local planning authority for any one of several reasons could impose intolerable and improper written directions and an aggrieved applicant will not have any recourse to a remedy or an appeal. This situation is precisely what the Appeal Board referred to as an "absurd result" and which the case of *Maunsell v. Olins & Anor* [1975] 1 All ER 16 referred to as, "injustice, absurdity, anomaly or contradiction".

The crux of the issue concerning the purposive approach or literal approach is one of *"casus omissus"* ie, that a matter which should have been, but has not been provided for in a statute. In this regard one has to bear in mind the words of Denning, LJ in *Seaford Court Estates Ltd v. Asher* [1949] 2 All ER 155, p. 164 (CA):

> ... when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature.
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> ... .A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.

Denning, LJ restated the same view in his dissenting judgment in this way in *Magor & St Mellons Rural District Council v. Newport Corporation* [1950] 2 All ER 1226, p. 1236:

> ... This was so obviously the intention of the Minister's Order that I have no patience with an ultra-legalistic interpretation which would deprive them in their rights together. I would repeat what I said in *Seaford Court Estates, Ltd v. Asher (supra*). We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.

In *Lucy v. WT Henleys Telegraph Works Co Ltd* [1969] 3 All ER 456, p. 462 Denning LJ reaffirmed this.

> How should we construe an Act of Parliament? I have said before, and I repeat it now, that we should so construe an Act of Parliament as to effectuate the intention of the makers of it, and not to defeat it. If they have by mistake overlooked something, we should do our best to smooth it out. We should construe it so as to avoid absurdities and incongruities, and to produce a consistent and just result.

Finally in *Northam v. London Borough of Barnet* [1978] 1 All ER 1243, Denning LJ delivered the final deathblow to the strict literal approach. Speaking of the Trade Union and Labour Relations Act 1974, he said at p. 1246:

> Yet they thought the judges had their hands tied by the words of the Act. They said:
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> > ... Clearly someone has a duty to do something about this absurd and unjust situation. It may well be, however, that there is nothing we can do about it. We are bound to apply provisions of an Act of Parliament however absurd, out of date and unfair they may appear to be. The duty of making or altering the law is the function of Parliament and is not, as many mistaken persons seem to imagine, the privilege of the judges or judicial tribunals.
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> I have read that passage at large; because I wish to repudiate it. It sounds to me like a voice from the past. I heard many such words 25 years ago. It is the voice of the strict constructionist. It is the voice of those who go by the letter. It is the voice of those who adopt the strict literal and grammatical construction of the words, heedless of the consequences. Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out-of-date. It has been replaced by the approach, which Lord Diplock described as the 'purposive' approach. He said so in *Kammins Ballrooms Co Ltd v. Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871 at 893, [1971] AC 850 at 881); and it was recommended by Sir David Renton and his colleagues in

> their valuable report entitled 'The Peparation of Legislation'. In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose underlying the provision'. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it - by reading words in, if necessary - so as to do what Parliament would have done had they had the situation in mind.

The purposive approach to legislative interpretation has been adopted by the Federal Court in *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636 and in *Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair* [1991] 2 CLJ 682; [1991] 1 CLJ (Rep) 441.

On Merits

In the *Bekerjasama-sama Serbaguna* case *(supra)*, Mahadev Shankar JCA said in the Court of Appeal that an application on the merits is one which depends on the inherent justice of the appellants' contention. It turns on the substantial facts of the case as distinguished from technical objections or collateral matter. I therefore directed Mr. Gurbachan to address me on the merits of his case.

Is Direction 16, *Ultra Vires* The TCPA?

The ejusdem generis point

The Appeal Board concluded that the applicant had no powers under s. 21(3) of the TCPA to impose the requirement that the existing building be preserved and that the 2nd respondent's proposed development be erected in the vicinity of the said building. In doing so, the Appeal Board held that s. 21(3) of the TCPA has to be read *ejusdem generis* to the specific matters enumerated in s. 21(3)(a) to (f) of the TCPA. The Appeal Board was of the view that the directions given to the 2nd respondent must relate only to the external appearance of the proposed building and not to the retention or preservation of an existing building.

The *ejusdem generis* point invariably relates to the construction of a statute and it is therefore relevant to see how the Malaysian courts have in the past treated this matter.

Where the words in a statute are plain and unambiguous they are to be given their plain, ordinary and common usage meaning (see *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170).

Peh Swee Chin FCJ) in *Kesultanan Pahang v. Sathask Realty Sdn Bhd* [1998] 2 CLJ 559 said at p. 606 as follows:

Whilst it is true that among the various rules of interpretation of statutes, it is an important rule that a statute should be construed as a whole for certain purpose and in fact the dissenting judgment seems to have been based on this but for finding and emphasizing the repeated use of the words of 'Malay subjects', etc. There are various other rules, such as the literal rule, the golden rule, the mischief rule (ie, the purposive approach rule), *ejusdem generis* rule, *expressio unius est exclusio alterius* rule, etc. The dissenting judgment does not refer to any other rules or their actual application by omitting to mention the names of such rules.

However apart from the aforesaid rules in aid of interpretation of statutes, there are also a large number of general presumptions which may apply unless precluded expressly or by necessary implication and which appear to have been totally ignored in the dissenting judgment too. Such general presumptions are, e.g. presumptions against (a) interference with vested rights; (b) a legislature not having a parliamentary or legislative intention for justice and common sense; (c) a legislature not knowing the existing state of the law and the decided cases on words interpreted by courts at the time of bringing in new legislation; (d) inconsistency in not interpreting similar language in statutes in *pari materia*, etc. There are the rules, and there are also the presumptions, all together involved in the interpretation of statutes, and for that matter in the interpretation of documents other than statutes.

It is in my view that not just a single rule of interpretation should be contemplated, pursued and employed in interpreting any statute to the exclusion of all others; one should test the said single rule with other rules and general presumptions wherever appropriate.

It is my further view that by far the most important rule for interpreting a statute, or section or words therein, is the purposive approach rule, which will in practice resolve most if not all of the difficulties one faces.

I hold that whether condition 16 is *ultra vires* or *intra vires* the TCPA falls to be decided by reference to the following proposition of law, which in my view is incontrovertible. The extract, paraphrased as appropriate is taken from the decision of Gopal Sri Ram JCA in *Datuk Bandar Kuala Lumpur v. Zain Azahari bin Zainal Abidin* [1997] 2 CLJ 248 where he held that the applicant being a local authority is a public decision maker upon whom a power or discretion is vested by Parliament under the provisions of the TCPA. The MPPP is therefore akin to a trustee. The MPPP is under an obligation to exercise its power and discretion reasonably and in accordance with the terms of the relevant statute that confers the power or discretion. It matters not a jot to the principle that the language employed in the conferment of the power or discretion is of wide amplitude. This much was made clear by the Federal Court in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, considered by all concerned to be the leading case upon the subject.

Coming to the case before me, it is my judgment that the Appeal Board was not wrong when it said that the specific matters enumerated in s. 21(3)(a) to (f) possess a common and dominant feature in that they all relate to the external character of a proposed building. The Appeal Board was, it must be remembered dealing with "the intention of the legislature as gathered from the entire section" and that general words are to be read as a continuation of the preceding specific matters in s. 21(3)(a)-(f). Taken in that context it is obvious that the genus identified by the Appeal Board relates to the "erection of a building" and the "written directions" relate to that building and not the retention or preservation of an existing building. Seen in the perspective herein stated, the Appeal Board's identification of "the external character" of a proposed building as the genus inherent in (a) to (f) of s. 21 is not at all inaccurate or a wrong conclusion.

The case of *Rethina Development Sdn Bhd v. Majlis Perbandaran Seberang Perai Butterworth* [1990] 1 CLJ 558; [1990] 3 CLJ (Rep) 24 was relied on by the applicant as authority for the proposition that any direction to a developer for carrying out landscaping and planting of trees in a housing scheme does come within the meaning of 'any other matter' that the local planning authority considers necessary for purposes of planning of s. 21(3)(g) of the TCPA thus giving it a wide interpretation and forestalling the application of the *'ejusdem generis'* rule.

With respect, the applicant has in my view, misunderstood the import of the *Rethina Development* case *(supra)*. It is certainly not an authority for the narrow principle propounded by the applicant. The judge in *Rethina*'s case was dealing with conditions imposed by the local authority when granting planning permission under s. 22(3) of the TCPA and an undertaking given by the developer at the time of approval of planning permission.

In the case before me, planning permission has not yet been granted and the written direction concerning the retention and preservation of the existing building was made under s. 21(3) of the TCPA, at the stage when the application for planning approval was made. In *Rethina*'s case, the *ejusdem generis* principle could not be applied in relation to tree planting because s. 22(5)(g) specifically provides for the planting of trees.

The applicant argued that the structure plan permits the local authority to identify areas and buildings of historical, cultural and architectural significance or with other attractive and pleasant features worth preserving and to take appropriate steps to conserve or preserve these areas and buildings in the planning and growth. Section 22(2) it is said, refers to the matters that a local authority shall take into consideration for proper planning, and the provisions of the development or structure plan is one of them.

In my view by the same token, it must be said that the applicant has failed to recognise that s. 22(2) is only applicable for the purposes of granting either absolutely or subject to conditions, or for refusal to grant planning permission. It is implicit that for the purposes of s. 21(3) there is no such requirement to take into account the provisions of the structure plan and therefore for that limited purpose the provisions of the structure plan are for all intents and purposes totally irrelevant. In other words for the purposes of issuing or giving written directions pursuant to s. 21(3), matters like historical and architectural significance as well as preservation of buildings cannot be the subject matter of 'written directions'. Compatibility with architecture, character or appearance of buildings located in the surrounding area of a new building can only be the subject matter of conditions imposed under s. 22(5)(i) of the TCPA. Therefore direction 16 is, *ultra vires* the TCPA. I therefore dismissed encl. 12 with costs.